

1 Robert J. McKennon (CA Bar No. 123176),
mckennon@barwol.com

2 Robert E. Hess (CA Bar No. 178042),
rhess@barwol.com

3 BARGER & WOLEN, LLP
19800 MacArthur Boulevard, 8th Floor
4 Irvine, California 92612
Telephone: (949) 757-2800
5 Facsimile: (949) 752-6313

6 James Pico, Esq., (NV Bar No. 368)
jpico@prvlawlv.com

7 PICO | ROSENBERGER
1960 SouthEastern Street
8 Las Vegas, NV 89104
Telephone: (702) 382-1110
9 Facsimile: (702) 382-1173

10 Attorneys for Defendants
11 The Paul Revere Life Insurance Company and
UnumProvident Corporation

12
13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF NEVADA – LAS VEGAS**
15

16 G. CLINTON MERRICK, JR.

17 Plaintiffs,

18 vs.

19 PAUL REVERE LIFE INSURANCE
COMPANY; a Massachusetts corporation,
20 UNUMPROVIDENT CORPORATION
(d/b/a UNUM LIFE INSURANCE
21 COMPANY OF AMERICA and
PROVIDENT LIFE AND ACCIDENT
22 INSURANCE COMPANY); and DOES I
through X inclusive, and ROES I through
23 X, inclusive,

24 Defendants.
25

Case No.: CV-S-00-0731-JCM (RJJ)
Action Filed : April 26, 2000

MOTION IN LIMINE NO. 1

[Filed Concurrently With:
- Request for Leave of Court to
File Reply Brief]

26 **DEFENDANTS' MOTION IN LIMINE TO PERMIT THE INTRODUCTION**
27 **OF EVIDENCE RELATING TO YOUNG MEE MERRICK'S**
28 **POST-VERDICT ADMISSIONS OF PERJURY**

Defendants The Paul Revere Life Insurance Company and UnumProvident Corporation (Collectively “Defendants”) respectfully move the Court for permission to introduce evidence relating to Young Mee Merrick’s post-verdict admissions of her and her husband’s perjury during the first trial. Defendants acknowledge that, during the hearing on defendants’ Motion to Allow Additional Discovery From G. Clinton Merrick, Jr. and Young Mee Merrick (“Motion”), the Court expressed the view that evidence relating to Young Mee’s admissions is not relevant to punitive damages and that Defendants’ sole recourse for obtaining the discovery sought through the Motion was a Rule 60(b) motion.¹ Because the Motion did not directly address admissibility of evidence, however, prudence and the need to make a clear record for appeal dictate that Defendants obtain a ruling on the admissibility of this evidence.

Evidence relating to Young Mee’s admissions might be adduced through three potential sources. First, if either Young Mee or Clinton Merrick (“Merrick”) testify at the upcoming trial, Defendants would want to cross-examine them about Young Mee’s admissions. Either party can admit evidence of the impact of Defendants’ conduct on Merrick, a relevant inquiry in a punitive damages case. If Merrick or his wife testify on this topic and leave the impression with the jury that Merrick was harmed by Defendants’ conduct, Defendants should be allowed to cross-examine them about Young Mee’s telephone calls. If Young Mee does not testify truthfully about the calls then Defendants’ counsel should be allowed to testify about the telephone calls to impeach her testimony.

BARGER & WOLEN LLP
19800 MACARTHUR BLVD.
EIGHTH FLOOR
IRVINE, CA 92612
(949) 757-2800

Second, if Merrick's bad faith expert Stephen Prater repeats (at trial) his assertions that Defendants unreasonably denied Merrick's claim, Defendants would want to ask him whether Young Mee's admissions alter his opinion.²

2. FACTUAL BACKGROUND

A. Young Mee's Unsolicited Communication With Defendants' Attorneys

On July 7, 2005, Young Mee telephoned Robert McKennon, one of Defendants' counsel, and identified herself as Merrick's current wife. Mr. McKennon, who recognized her name and voice from the trial, took the call. *McKennon Decl.* at ¶ 3.³

Young Mee then told Mr. McKennon that she was going to divorce Merrick and that she intended to leave their home soon. She characterized Merrick as a "bad man" and said that she was calling from a public telephone because she did not want Merrick to trace the call. Young Mee added that she was very fearful of what Merrick might do if he were to discover that she had called Mr. McKennon. *Id.* at ¶ 5.

² Because this motion, if granted, could establish Defendants' current counsel of record as trial witnesses and thereby require Defendants to retain new trial counsel, Defendants' request that the Court resolve this motion at its earliest convenience.

³ Defendants respectfully request that this Court take judicial notice of the Declaration of Robert J. McKennon filed in support of Defendants' Motion, which Declaration is incorporated herein by this reference in support of this motion and is concurrently filed herewith.

1 Young Mee then stated that both she and Merrick lied on the witness stand
2 regarding his alleged disability. She said that Merrick “forced me to lie on the
3 witness stand.” She further stated that Merrick committed fraud with respect to his
4 disability claim and that he was not then, and never had been, actually disabled. *Id.*
5 at ¶ 6. In response to Mr. McKennon’s questions regarding Merrick’s cognitive
6 condition, Young Mee told him that Merrick does not have any cognitive difficulties
7 or problems that would limit his ability to perform his occupation as a venture
8 capitalist (*id.* at ¶ 7)—which completely contradicts the testimony that Young Mee
9 and Merrick gave at trial.

10
11 Young Mee also told Mr. McKennon that she had assembled numerous
12 documents that prove that Merrick was lying at trial. *Id.* at ¶ 8. Unfortunately, she
13 did not provide any additional details or otherwise describe these documents.
14 However, she did indicate that she could obtain additional records to confirm that
15 Merrick is not disabled while she remains living with him and has access to them.
16 *Id.*

17
18 Mr. McKennon asked Young Mee if she would agree to testify to the
19 information she had conveyed during this call, and she said that she would. *Id.* at
20 ¶ 9. However, she then asked Mr. McKennon to convey to Paul Revere’s
21 “President” that she wanted \$5,000,000 in return for her testimony and the
22 documents that she claimed would prove that Merrick had lied about his disability,
23 that he filed a fraudulent claim, and that he was not and never had been disabled. *Id.*
24 When Young Mee made this proposal, Mr. McKennon immediately told her that
25 under no circumstances could Paul Revere pay her anything in exchange for her
26 testimony or documents, as doing so would be inappropriate, unethical, and possibly
27 illegal. *Id.* at ¶¶ 9, 12. However, Mr. McKennon encouraged her to agree to testify
28 anyway to discharge her ethical obligations to the court and to counsel. *Id.*

1 After the telephone call was disconnected for an unknown reason, Young
2 Mee called Mr. McKennon again. *Id.* at ¶ 11. Another of Defendants' counsel,
3 Robert Hess, was a witness to this second call. *Id.* at 12. After Young Mee again
4 inquired whether Paul Revere would be interested in this evidence, Mr. McKennon
5 again advised her that Paul Revere could not and would not pay her for her truthful
6 testimony or evidence. *Id.* Mr. McKennon again attempted to convince her that she
7 had an ethical and moral obligation to tell the truth without any compensation. *Id.*
8 At that point, Young Mee ended the call but stated that she would call Mr.
9 McKennon again the following morning. *Id.* She did not do so and has not made
10 contact with Mr. McKennon or anyone from his office since that second call ended.
11 *Id.* at ¶ 14.

12
13 **B. Involvement of The United States' Attorney And The Federal**
14 **Bureau of Investigation**
15

16 Following these calls, Defendants' counsel retained the services of Las Vegas
17 attorney Richard Wright, a former Assistant U.S. Attorney who specializes in
18 criminal law. *Id.* at ¶ 13. With his assistance, Defendants made contact with Kirk
19 Schulke of the office of the U.S. Attorney in Nevada. *Id.* Mr. Schulke advised Mr.
20 Wright that he intended to contact an agent at the White Collar Crime division of the
21 FBI's Las Vegas office. *Id.* Mr. McKennon then contacted David Nanz of the FBI.
22 *Id.* Mr. McKennon had numerous telephone calls with Mr. Nanz about the calls and
23 informed Mr. McKennon that he was very interested in investigating them. *Id.* Mr.
24 Nanz agreed to do so and attempted to contact Young Mee on several occasions to
25 interview her. *Id.* However, when he attempted to do so, he learned that Merrick
26 and Young Mee had taken a vacation and were unavailable for several weeks. *Id.*
27 Upon Merrick's and Young Mee's return, Mr. Nanz again attempted to contact
28 Young Mee. *Id.* When Mr. Nanz attempted to contact Young Mee, however, he

1 was informed that she had retained a criminal lawyer and would refuse to answer
2 any questions and would refuse to meet with him. *Id.*

3
4 **3. DEFENDANTS SHOULD BE PERMITTED AT TRIAL TO**
5 **OFFER EVIDENCE OF YOUNG MEE'S TELEPHONE CALLS**

6
7 Defendants will not burden the Court by repeating our arguments about why
8 evidence that Merrick fabricated his claim and suborned his wife's perjury is
9 relevant to the punitive damages inquiry. Defendants adhere to the position set forth
10 in the Motion, that evidence of a plaintiff's unclean hands is plainly relevant to
11 whether to bestow upon that plaintiff a punitive damages windfall and, if so, in what
12 amount.⁴

13
14 Moreover, if either of the Merricks or Prater open the door by continuing to
15 assert that the handling of Merrick's claim was egregiously improper, it would be
16 grossly unfair to deprive Defendants of the right to cross-examine the Merricks and
17 Prater regarding the newly discovered evidence of fraud and perjury and to call

18
19 ⁴ See, e.g., *White v. Ford Motor Co.*, 500 F.3d 963, 975 (9th Cir. 2007) (holding that
20 jury in punitive damages retrial must be informed of the plaintiffs' contributory
21 negligence because "Nevada law required the jury to consider—in arriving at a
22 punitive damages award—"the reprehensibility of [the defendant's] conduct," Nev.
23 J.I. 10.20, and **reprehensibility is judged in relation to the conduct and actions
24 of others, not merely by looking at Ford's conduct in the abstract. We assess
25 blame for tortious conduct in relation to other contributory causes.**") (emphasis
26 added); *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 467 (3d Cir.
27 1999) (suggesting that the plaintiff's breach of a distributor agreement and its own
28 tortious activities weighed against a high punitive award); *Hoxsey v. Beaird*, 287 F.
Supp. 416, 419-20 (W.D. Okla. 1968) (declining to award punitive damages to
plaintiffs because of their unclean hands—specifically, their knowing wrongful
receipt of confidential information); *Ezzone v. Riccardi*, 525 N.W.2d 388, 399
(Iowa), *as amended on denial of reh'g* (1994) (concluding that defendants' conduct
was the result of provocation by plaintiffs, including affirmative misrepresentations,
and reducing punitive award by over 90 percent); *Day v. Hill*, 1993 WL 186646
(Ohio Ct. App. 1993) (trial court properly rejected plaintiff's claim for punitive
damages because of, *inter alia*, the plaintiff's unclean hands—specifically, his
wrongful removal of a vehicle on which defendants had a lien).

1 Messrs. McKennon and Hess as witnesses to supply the factual predicate. As the
 2 Supreme Court recently reiterated, “the Due Process Clause prohibits a State from
 3 punishing an individual without first providing that individual with an opportunity
 4 to present every available defense.” *Philip Morris USA v. Williams*, 127 S. Ct.
 5 1057, 1063 (2007).

6
 7 At a minimum, the parties will put on evidence for the jury to consider in
 8 making its determination of what (if any) the amount of punitive damages should be.
 9 It is widely recognized that, among the considerations relevant to setting the amount
 10 of punitive damages are “[t]he impact of defendant’s conduct on the plaintiff”
 11 (*Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992)) and “the harm that
 12 is likely to occur from the defendant’s conduct as well as to the harm that actually
 13 has occurred” (*Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 904 (W. Va.
 14 1991)). The United States Supreme Court’s cases are consonant with these holdings.
 15 In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the Court held
 16 that there are three factors to consider in determining whether the amount of a
 17 punitive damages award comports with the federal due process clause: “(1) the
 18 degree of reprehensibility of the defendant’s misconduct; (2) **the disparity between**
 19 **the . . . harm suffered by the plaintiff** and the punitive damages award; and (3) the
 20 difference between the punitive damages [and comparable civil penalties where
 21 available].” *Id.* at 418 (emphasis added). *See also White v. Ford Motor Co.*, 500
 22 F.3d 963, 972 ((9th Cir. 2007)(Court reversing punitive damages award because
 23 district court rejected jury instruction that Ford could be punished only “for the
 24 harm to this plaintiff” and not for the harm to non-parties.) Thus, it is Defendants’
 25 intention to question Mrs. Merrick about the impact of Defendants’ conduct on her
 26 husband and the scope of harm (if any) that actually occurred. In the event that Mrs.
 27 Merrick perpetuates her perjury during this trial by testifying that her husband was
 28 disabled or that Defendants’ conduct caused him great harm, the content of her

1 conversations with Mr. McKennon should be admissible for impeachment purposes.
2 In order for Mrs. Merrick to testify about the impact of Defendants' denial-of-
3 benefits decision on her husband, she will have to affirmatively state that he was
4 disabled. This will "open the door" for Defendants to question her about her
5 statements to Mr. McKennon that Merrick was *not* disabled.

6
7 "A basic rule of evidence provides that prior inconsistent statements may be
8 used to impeach the credibility of a witness." *See* FRE 613, 801(d)(1)(A); *United*
9 *States v. McLaughlin*, 633 F.2d 949, 952 (9th Cir. 1981) (quoting *United States v.*
10 *Hale*, 422 U.S. 171, 176 (1975)). As the Tenth Circuit has explained, a "witness
11 should not be permitted to engage in perjury, mislead the trier of fact, and then
12 shield himself from impeachment." *United States v. Magallanez*, 408 F.3d 672,
13 680-681 (10th Cir. 2005). Under this principle, Mrs. Merrick cannot testify about
14 the alleged scope of harm to Merrick (a relevant inquiry in a punitive damages trial)
15 without Defendants having the opportunity to impeach her.

16
17 In the event that Mrs. Merrick denies making two telephone calls to Mr.
18 McKennon or claims to have forgotten the content of those conversations, the
19 details should be admissible through direct testimony by Messrs. McKennon and
20 Hess. As the Ninth Circuit has explained, "if on cross-examination the witness has
21 denied making the statement, or has failed to remember it, the making of the
22 statement may be proved by another witness." *United States v. Monroe*, 943 F.2d
23 1007, 1012 (9th Cir. 1991) (internal citation omitted). Messrs. McKennon and Hess
24 have personal knowledge of the telephone conversations and can testify regarding
25 the details. Their testimony will be necessary to prevent Mrs. Merrick from
26 engaging in perjury and then shielding herself from impeachment by denying
27 knowledge of the conversations.

28

1 In sum, it is one thing to preclude Defendants from affirmatively seeking to
2 establish that they were right all along and that Merrick is not and never was
3 disabled; it is quite another to allow Merrick and his wife to further commit perjury,
4 and to allow Merrick, his counsel, and his expert witness to perpetrate a continuing
5 fraud by maintaining, in the face of newly discovered evidence to the contrary, that
6 Defendants had no reasonable basis for denying his claim and did so only because
7 they are companies bent on cheating their insureds. The Court's ruling on
8 Defendants' Motion may have been a shield, but a ruling that Defendants cannot
9 raise this evidence in response to Merrick's attempt to procure a large punitive
10 award by fraud and perjury would be a lethal sword.

11
12 **4. CONCLUSION**

13
14 The Court should permit Defendants to introduce evidence of Young Mee
15 Merrick's post-verdict admissions of perjury.

16
17 Dated: April 16, 2008

BARGER & WOLEN, LLP

18
19 By: /s/ Robert J. McKennon
20 ROBERT J. MCKENNON
21 ROBERT E. HESS
22 Attorneys for Defendants The Paul
23 Revere Life Insurance Company and
24 UnumProvident Corporation
25
26
27
28

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 19800 MacArthur Blvd., Suite 800, Irvine, CA 92612; Facsimile No.: (949) 752-6313; E-mail address: lacoba@barwol.com.

On **April 16, 2008**, I served the foregoing documents described as: **DEFENDANTS' MOTION IN LIMINE TO PERMIT THE INTRODUCTION OF EVIDENCE RELATING TO YOUNG MEE MERRICK'S POST-VERDICT ADMISSIONS OF PERJURY** on the interested parties pursuant to the attached Service List.

☒ **ELECTRONICALLY:** I caused a true and correct copy thereof to be electronically filed using the Court's Electronic Court Filing ("ECF") System and service was completed by electronic means by transmittal of a Notice of Electronic Filing on the registered participants of the ECF System. I served those parties who are not registered participants of the ECF System as indicated below.

☐ I placed the ☐ original ☐ a true copy thereof enclosed in sealed envelope(s) to the parties listed above and caused such envelope(s) to be delivered by ☐ **U.S POSTAL SERVICE** ☐ **OVERNIGHT DELIVERY**.

☐ **BY E-MAIL:** I electronically transmitted a true and correct copy thereof to the interested parties' electronic notification address(es) of record before close of business for the purpose of effecting service and the transmission was reported as complete and without error.

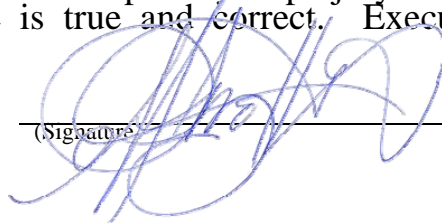
☐ **FACSIMILE TRANSMISSION:** Based on ☐ court order ☐ agreement of the parties, I caused a true copy thereof to be served by transmitting via facsimile machine to the interested parties' facsimile number(s) of record before close of business. The transmission was reported as complete, without error.

☐ **PERSONAL DELIVERY:** I caused ☐ the original ☐ a true copy thereof to be delivered by hand to the interested parties by an employee or independent contractor of a registered process service.

I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed at Irvine, California on **April 16, 2008**.

NAME: Lizette C Acoba

(Signature)



SERVICE LIST

Julie A. Mersch, Esq. Attorneys for Plaintiff
701 S. 7th Street
Las Vegas, NV 89101
Tel: 702-387-5868
Fax: 792-387-0109 fax
E-mail: jam@merschlaw.com

Charles McB. Sasser, Esq. Attorneys for Plaintiff
The Sasser Law Firm, P.A.
1011 East Morehead Street, Suite 350
Charlotte, NC 28204
Tel: 704-342-4200
Fax: 704-342-0798
E-mail: jtrusso@sasserlawoffice.com

Richard H. Friedman, Esq. Attorneys for Plaintiff
Friedman, Rubin & White
1126 Highland Avenue
Bremerton, Washington 98337
Tel: 360-782-4300
Fax: 360-782-4358
E-mail: rfriedman@frwlaw.us